is entitled is reduced in like amount.[13] It is apparent then that in seeking recovery the insured has the option to pursue either of two courses: to proceed directly against the insurer or first to exhaust other claims which he may have in respect to the damaged property. The result of the adoption of the latter course is clearly pointed out by the New York court in the case of *Heilbrunn* v. *German Alliance Ins. Co.* (N. Y. 1912) 135 N. Y. Supp. 769. The insured, a mortgagee, exercised his option by proceeding against the mortgagor after the loss and before bringing suit against the insurer. He then sued the insurance company, but as the debt had been paid in full he could not show in what way he had been damaged, and the court, therefore, properly denied him recovery. Where the former course is adopted and the insured proceeds directly against the insurer, justice requires that the same result be ultimately reached through the process of subrogation. Universally, the insurer may stand in the insured's shoes with reference to the latter's right against a tort feasor, who has been responsible for the loss, for in that case as between parties who are under obligation to make good a loss, the one who has caused the loss is equitably bound to bear the burden.[14] If the premise taken above be true and the promise of indemnity is not for damage to the property but for damage to the insured's interest therein, the right of subrogation should be extended to include contractual and other claims which the insured may have in the property. The right is in its nature equitable; it does not depend upon contract between the parties[15] and if the insured receives the amount of his claim in addition to reimbursement for the loss of security it is obvious that he is made doubly whole.[16] Finally, as a corollary to this right of subrogation, it is evident that if the insured has, after payment by the insurer, received satisfaction of his claim against the third person in respect to his interest in the insured property, the insurer may sue for the excess the insured has received over and above indemnity.[17]

MALICIOUS USE OF PROPERTY.—The view taken by a unanimous court in the recent case of *Norton* v. *Randolph* (Ala. 1912) 58 So. Rep. 282, that equity will enjoin the malicious erection of a spite fence,

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[13]Parker *v.* Eagle Fire Ins. Co. (1857) 75 Mass. 152; Hadley *v.* N. H. Ins. Co. (1875) 55 N. H. 110.

[14]Hall *v.* The Railroad Cos. (U. S. 1871) 13 Wall. 367; Hart *v.* Western R. R. Corp. (Mass. 1847) 13 Metc. 99.

[15]St. Louis etc. Ry. Co. *v.* Commercial Union Ins. Co. (1890) 139 U. S. 223. But in Massachusetts before the passage of a statute allowing this right the insurer could not claim subrogation to the right of a mortgagee against the mortgagor. Suffolk Fire Ins. Co. *v.* Boyden (1864) 91 Mass. 123.

[16]Castellain *v.* Preston (1883) L. R. 11 Q. B. D. 380; Darrell *v.* Tibbits (1880) L. R. 5 Q. B. D. 560; Sussex etc. Ins. Co. *v.* Woodruff (1857) 26 N. J. L. 541.

[17]Castellain *v.* Preston *supra* (recovery of insurance money after payment of mortgage debt to insured, the mortgagee); Darrell *v.* Tibbits *supra* (recovery from lessor after lessee had performed agreement to repair). And if the insured has released any rights against third persons to which the insurer might have been subrogated the insurer may, after payment to the insured, recover the damage suffered thereby. Phœnix Ass. Co. *v.* Spooner L. R. [1905] 2 K. B. 753.

squarely raises the question whether the common law maxim *cuius est solum* can throw the safeguard of its protection over a property owner who exercises his rights for the sole purpose of inflicting injury upon others. The malicious exercise of property rights has never received that careful consideration which courts have bestowed upon the malicious exercise of purely personal rights in cases involving unfair competition and trade combination.[1] This has been due to the fact that instances of the former are comparatively rare and exceedingly limited in scope and that the courts have usually dismissed the question summarily upon the ground that since an absolute property right is involved the resulting injury is *damnum absque injuria.*[2]

Since *prima facie,* the intentional and wilful infliction of harm on another gives rise to a cause of action,[3] the plea of an absolute property right as a justification invites a rigid examination. It is clear that there is an absolute right on the part of the property owner to make whatever beneficial use and enjoyment he can out of his property.[4] It is true also that in making such beneficial use his motive can not be inquired into. The fact that malice may be an incidental or even a controlling motive makes no difference so long as he is engaged in a use which can be actually beneficial to him in the enjoyment of the *res.*[5] So far he is exercising an immediate right of ownership for the sake of which property is recognized by law. But it is plain that when he uses his property for the sole purpose of injuring others and in such a way that he can not possibly derive any benefit therefrom as owner, he is exercising not a right of ownership but a mere incident of rights which were established for very different ends.[6]

The two most conspicuous instances of the actual adjudication of the courts on the exercise of this "quasi-accidental"[7] right to injure others are found in the cases involving percolating waters and malicious structures. In England, the orthodox view is strictly adhered to and the owner is protected in his unlimited control of waters percolating through his soil, even if his sole purpose be to inflict malicious injury on his neighbor.[8] In America, while the English view originally prevailed,[9] the weight of authority now takes the more enlightened position that the owner's control should be limited to beneficial use

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[1]See note to Passaic Print Works *v.* Ely (1900) 105 Fed. 165, 62 L. R. A. 673; Lewis on "Motive in Trade and Labor Cases," 5 COLUMBIA LAW REVIEW 107; 9 COLUMBIA LAW REVIEW 455.

[2]Pickard *v.* Collins (1856) 23 Barb. 444; see collection of authorities in case note to Koblegard *v.* Hale (1907) 60 W. Va. 37.

[3]Pollock, Torts (7th ed.) 319; 20 Harv. L. Rev. 253, 262; 20 L. Q. R. 10, 22; 2 COLUMBIA LAW REVIEW 37; dissenting opinion of Sanborn, J. in Passaic Print Works *v.* Ely *supra.*

[4]2 Tiedeman, State and Federal Control of Persons & Property, 145.

[5]Ladd *v.* Flynn (1892) 90 Mich. 181; Gallagher *v.* Dodge (1880) 48 Conn. 387.

[6]Rideout *v.* Knox (1899) 148 Mass. 368; Burke *v.* Smith (1888) 69 Mich. 380.

[7]Rideout *v.* Knox *supra,* 374.

[8]Acton *v.* Blundell (1843) 12 M. & W. 324; Chasemore *v.* Richards (1859) H. L. C. 349.

[9]Ellis *v.* Duncan (N. Y. 1855) 21 Barb. 230; Roath *v.* Driscoll (1850) 20 Conn. 533.

and enjoyment and the "quasi-accidental" right to divert percolating waters solely to injure others is denied.[10]

The right to maintain malicious structures is to-day clearly established in England[11] and, it seems, justifiably so. Inasmuch as the only method of preventing the negative easement of light and air from arising is by erecting a structure for the purpose of preventing their passage,[12] the question of malice is immaterial.[13] The owner is engaged in making a beneficial use of his property in that he is preventing its subjection to the easement of ancient lights. When the question of spite fences first arose in this country, the English view was followed upon the same reasoning.[14] Subsequently, when it was settled that this easement could not be acquired here, the courts refused to discard the rule although the reason for it had disappeared and based their decisions on the old common law maxim.[15]

This attitude is often defended upon the practical ground that any other result would leave property rights to be determined by the whims of a jury.[16] But this justification is hardly tenable since the question of malice has always been held capable of proof as a cause of action in cases of malicious prosecution[17] and as an element of damages in all torts.[18] Furthermore there is the strong legal presumption that the jury will find the facts only as they exist.[19] On principle, it is submitted that there can be no adequate justification for the law's safeguarding a property owner in the exercise of a socalled incidental right which is so inconsequential as not to come within the protection of the "due process" clause of the Fourteenth Amendment,[20] and whose only purpose is to gratify malevolence and to inflict wanton harm. Where the law has already become crystallized, the reluctance of the courts to disturb settled rules of property will no doubt impose upon the legislatures the duty of curbing the right to maintain spite fences,[21] but where, as in the jurisdiction of the principal case, the question is an open one, its example should be universally followed.[22]

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[10]Chesley *v.* King (1882) 74 Me. 164; Holdeman *v.* Bruckhardt (1863) 55 Pa. St. 514; 9 COLUMBIA LAW REVIEW 543.

[11]Note to Letts *v.* Kessler 54 Oh. St. 73, 40 L. R. A. 177; Burdick, Torts (2nd ed.) 44.

[12]Combes, Law of Light, 158; see Chandler *v.* Thompson (1811) 3 Campb. 80.

[13]Note to Letts *v.* Kessler *supra.*

[14]Mahan *v.* Brown (N. Y. 1838) 13 Wend. 261.

[15]Parker *v.* Foote (N. Y. 1838) 19 Wend. 308; Pickard *v.* Collins *supra;* Myers *v.* Gemmel (N. Y. 1851) 10 Barb. 537.

[16]Pickard *v.* Collins *supra; cf.* dissenting opinion of Holt J. in Barger *v.* Barringer (1909) 151 N. C. 433.

[17]Burdick, Torts (2nd ed.) 249.

[18]*Ibid.* 199.

[19]Aikens *v.* Wisconsin (1904) 195 U. S. 194.

[20]Horan *v.* Byrnes (1903) 72 N. H. 93; Lord *v.* Langdon (1898) 91 Me. 221; Rideout *v.* Knox *supra.* But the statute is held to apply only to fences on or near the dividing line. Brostrom *v.* Lauppe (1901) 179 Mass. 311. In California it is applied only to fences on the boundary line. Granite Co. *v.* Knickerbocker (1894) 103 Cal. 111. Malice must be the predominant motive. Gallagher *v.* Dodge *supra.*

[21]Karasik *v.* Peier (1900) 22 Wash. 419; Freund, Police Power, 452; see Metzger *v.* Hochrein (1900) 107 Wis. 267.

[22]Burke *v.* Smith *supra;* Barger *v.* Barringer *supra.*